VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

DAUNIS MCBRIDE AND T. B. BENSON, *Associate Editors.*

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There has always been a spirit of cameraderie amongst lawyers and a desire to help one another along in a professional way. Many lawyers, especially the younger ones, are going to enlist in this war which Germany has forced upon us. A writer in one of the newspapers has said, speaking of lawyers who enlisted during the anticipated trouble with Mexico:

What Lawyers Who Are Non-Combatants Can Do.

"Many lawyers who saw border service suffered heavily in loss of clients, and in some cases a practice built up by years of effort was ruined. To make this impossible in the future General Stotesbury has written to Charles E. Hughes, President of the State Bar Association, urging him to have the lawyers of each county form a committee to take over the work of any member called out on State or Federal duty, without expense to the absent lawyer, and Attorney General (N. Y.) Woodbury made a similar suggestion.

Judge Hughes sent to the heads of all city and local bar associations in the State a letter indorsing the suggestion of Attorney General Woodbury that local committees of lawyers be formed to take over the uncompleted work of attorneys who enter the Federal service. In many cases the letter has already been effective in causing the organization of committees. In this letter ex-Justice Hughes said:

'At this time nothing should be left undone which in a practicable way will safeguard the interests of those who are responding to their country's call.' "

We heartily concur in this suggestion of Judge Hughes and sincerely hope that every bar, whether associated or not, will form an organization to take over and conduct all work of lawyers who enlist, and give the fees to the family of the lawyer whose work they take over. The writer cannot forbear upon this occasion to set down for preservation the conduct of one

lawyer at the Charlottesville Bar during the Civil War. Col. R. T. W. Duke had been the successful competitor for the office of attorney for the Commonwealth over Judge Egbert R. Watson (*Clarum et venerabile nomen*). Col. Duke at the John Brown raid had organized a military company, "The Albemarle Rifles," afterwards Company "B" of the 19th Virginia Regiment, Pickett's Division.

When the Civil War commenced Captain Duke deemed it his duty to go into service with his company and contemplated resigning his civil office. Judge Watson heard of it, came to him and urged him not to resign.

"I am too old for service, Walker," he said, calling Col. Duke by the name by which he was known to his intimate friends; "Let me serve my country by serving you, a young lawyer with a young family."

Col. Duke consented, with the request that Judge Watson would retain the fees of the office. But this, that noble gentleman refused to do. For four years he did every bit of the work and regularly sent every fee to Col. Duke's wife, and after the war and reconstruction, when Col. Duke was a candidate for re-election, he had no warmer supporter than his old opponent.

The editor may be pardoned for recalling this incident not only that it may be placed on permanent record, but as an example to be followed.

A New Code of International Law Needed.

A learned professor once told the editor that one of his class in international law in answer to the question "What is international law?" replied, "A gentleman's agreement amongst civilized nations, which has resolved itself into certain fixed rules, which remain fixed as long as it suits the nations."

We do not believe Bentham, the originator of the name, ever gave a better definition, and we hope the professor gave his pupil an "A 1" upon this question. Any definition means very little at this time, when in the last two years almost every principle of international law has been violated. The "gall"—we can think of

no better word—of Germany in calling for the enforcement of an ancient treaty upon the part of our Government when she herself had violated every treaty which it suited her to break and had disregarded every rule of war known to civilized nations, is only equalled by her sublime audacity in claiming to be victorious even when retreating. But her flagrant and reckless conduct towards other nations, especially in her submarine warfare, must give a good deal of anxiety to those gentlemen who gravely formulate rules for the future guidance of nations. Will not all international laws relating to the seas, to the conduct of wars, to the treatment of civilians in captured territory, have to be rewritten? And when rewritten, will it not be necessary to establish some sort of world police force to carry them out? Back of all law has to be force of some sort. Moral force seems to be gaining great headway in the last few decades prior to 1914. The war between "Christian" Russia and "Heathen" Japan was conducted—especially on the part of the "Heathen" nation—in strict accordance with the most humane principles possible in that hideously brutal thing called war. Never were the christian virtues of chivalry, courage, kindness to prisoners and consideration towards non-combatants exemplified in a nobler way than by the Japanese soldier and the Japanese Government. Contrasted with the hideous brutality, the fiendish malignity, the devilish cruelty with which Germany has waged war, Japan stands out as an angel of light by the darkness of Baalzebub. "Kultur" has in her hands become synonymous with "crime," and her place in the sun has become a land of darkness and the shadow of death. And when this war is over and the world tries to adjust itself to new conditions, who is to remake the laws to govern the nation? Who is to enforce them when made? Moral forces cannot be counted upon. Physical force can only become the controlling force when it has strength enough to awe the would-be criminal nation.

New forces, too, have entered into consideration and must be taken into account. The aeroplane, the zeppelin, the submarine, gas, tear-bombs, the machine guns—neither Grotius nor Vattel in their wildest dreams imagined anything like them. The air and the sea can no longer be claimed as free to all nations when

man has overcome the heights of the one and the depths of the other, and new rules must be adopted to suit new conditions. It looks now at this present writing that practically all of America, Great Britain, France, Belgium, Italy, Russia, Portugal, Japan and China, not to speak of Roumania and Serbia, are arrayed against Germany, Austria, Hungary, Bulgaria, and the Turks. Has not the time come when strong countries now in alliance can amidst this storm and fire and earthquake hear the still small voice of International Conscience calling to them to unite in peace as they have in war and make peace perpetual when the war is over? Cannot the great jurists of the world formulate a new code to govern the nations and cannot the nations agree to keep marines and navies enough to overawe and, if need be, punish any infractor of the code? A world court is possible—why not a world police force? Neither is of any great value without the other. But both being possible the attention of every statesman, of every lawmaker, of every thinker, should be called to the great need of devising a new set of laws governing all nations and the best method of enforcing them. A league already exists in this country whose object is to arouse public attention to the necessity of enforcing peace.

Ex-President Taft has devoted his high talent and given much time to spreading the doctrines taught by this league. Our profession should encourage this movement and each lawyer consider himself a member of it and do all in his power to aid its efforts and promote its aims.

The Growth of the Police Power Doctrine.

In an exceedingly valuable and interesting work—noticed elsewhere—Professor Freund, of the University of Chicago, has called attention to a fact which may seem somewhat surprising to those who have not thought upon the subject, i. e., that the police power for the English speaking race really had its origin in the ill-famed Star Chamber. The duty and power of guarding the public welfare was not then dependent upon legislative or judicial action. The original exercise of this power was in its inception even in

that body more beneficent than otherwise; though, as is well known, it became later a source of outrageous and illegal persecution.

History repeats itself and it is not improbable that the police power now given such an extensive operation by the Supreme Court of the United States may in the end lead to persecution under the authority of the law almost as great as ever the Star Chamber exercised. For higher than our fundamental laws the Supreme Court seems to have exalted this inherent power which has ever been, like the law of self-preservation, one of the first laws of government. The far-reaching effect which our highest tribunal has given to this power is not unworthy of a more serious and prolonged study than a mere editorial can afford. Prof. Freund has also written an admirable work on this subject.

In the case of *Armour* vs. *North Dakota,* 240 U. S. 510, the Court enters into quite a discussion of this subject. The Supreme Court of the State—North Dakota—said in that case that the law (which was in regard to the net weight of retail packages of lard) was drafted by the Pure Food Commission and that therefore it might be reasonably assumed "after twelve years of observation and study that the expert who draughted the law, the legislature who passed it, and the Governor who approved it, all thought necessity existed for such a measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this Court believes the law not only reasonable but necessary, and this belief is founded upon the evidence in this case and upon facts of which this Court can take judicial cognizance." The Supreme Court of the United States quotes the above language and then says:

"The court by these remarks expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however

strongly sustained. And by evils it was said there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them, or be convinced of the wisdom or adequacy of the laws. *Rast* v. *Van Deman*, &c., 240 U. S. 342. *Tanner* vs. *Little*, 240 U. S. 369."

Language cannot be much stronger than this. Indeed the Court seems to set no limit to the power of the states to carry out any police regulation as long as it did not work out unreasonably. What is unreasonable is yet undefined and undefinable and the dissenting opinion of Mr. Justice White in the *Trans-Missouri* case, 166 U. S. 290 (1897) should be read in connection with the opinion of the same Justice speaking as Chief Justice for the Court in the *Standard Oil and Tobacco cases*, 221 U. S. p. 1, fourteen years later. The test seems entirely that of prejudice to the public.

Within the last few months decisions of this court have further extended the application of this doctrine. As a firm believer in the now almost defunct theory of States Rights it is gratifying to the Editor to find that in many matters of internal regulation the states are yet supreme; but that this supremacy may yet prove a source of danger to the liberty of the individual is not without question. But this article is not intended as a treatise upon that branch of the subject; it is mainly intended to call attention to some of the late decisions. We find that on Dec. 4th, 1916, in the case of *Hutchison Ice Cream Co.* vs. *Iowa*, a state can regulate the percentage of butter fat in ice cream without infringing the "due process" clause of the Constitution. This is under the police power and the Court quotes the Armour case *supra* and *Schmidinger* v. *Chicago*, 226 U. S. 578.

On the same day the Court sustained the New Jersey statute which required both resident and non-resident owners of automobiles to register the same, have the drivers of the machines licensed and in the case of non-resident owners to appoint the Secretary of State as their agent upon whom process may be served "in any action or legal proceeding caused by the operation of the registered motor vehicle within this state

against such owner." This statute had no reciprocal provision by which non-residents whose cars are duly registered in their home state are given for a limited period free use of the highways in return for similar privileges granted to residents of New Jersey. The license fees collected are in excess of the amount required to maintain the regulation and inspection department but this excess was applied to the maintenance of the highways. In this case, *Kane* v. *New Jersey,* the Court, approving *Hendrick* v. *Maryland,* 235 U. S. 610, held that the New Jersey law, although differing from the Maryland law in not granting "reciprocity" to motor vehicles duly registered in another state and in the fact that the owner in that case merely drove *into* the state (Kane was driving *through* the State) was in no way in conflict with the Constitution of the United States, and as Congress had not passed any general law covering the subject each state might rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others.

In *Chicago Terre Haute, &c., Rwy. Co.* v. *Anderson,* decided December 18th, a statute requiring railways to cut down and destroy weeds on lands "occupied by them under penalty of $25.00" recoverable by "any person feeling himself aggrieved," was held not to offend any clause in the United States Constitution.

So in *Thomas Cusack Co.* vs. *Chicago,* decided January 15th, 1917, a municipal ordinance, passed under legislative authority, regulating the construction and maintenance of bill boards was held to be a valid exercise of the police power unless it is clearly unreasonable and arbitrary.

The Court, referring to *Armour* vs. *North Dakota* as an elaborate discussion of the exercise of the police power, contents itself with saying, "While this Court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the State enacting them, and so relunctantly disagrees with the local legislative authority, primarily the judge of the public welfare, es-

pecially when its action is approved by the higest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. *Jacobson* v. *Massachusetts,* 197 U. S. p. 11.

In *Lehon* vs. *City of Atlanta,* decided December 4th, 1916, the Court holds that municipal ordinances which subject the business of a private detective or detective agency to police supervision and provides that no person shall carry on such business without first being recommended by the board of police commissioners and taking the oath of a city detective and giving a bond do not offend against the due process of law and equal protection of the laws clauses of the U. S. Court 14th Amendment, but are valid exercises of the police power.

Two cases decided January 8th, 1917—*Crane* v. *Johnson, Governor of California, &c.,* and *McNaughten* vs. *Same,* decide that a state in the exercise of its police power may confine to registered optometrists, who have passed the required examination, the right to employ means other than drugs to measure the range of human vision and the accommodative and refractive states of the human eye, and that the state's police power extends to requiring—as the California law does require—that drugless practitioners employing faith, hope and the processes of mental suggestion and mental adaptation in the treatment of diseases, shall have completed a prescribed course of study and passed an examination.

And even a far more extended power is given to the states in the celebrated "Blue Sky" law cases which came before the court in five cases—three from Ohio, one each from Michigan and South Dakota, the law being almost identical in the three states. This law was intended to prevent dealing in fraudulent stocks; in other wise to license dealing in corporate or quasi corporate securities so as to protect the public from the numerous "get rich quick" schemes through which so many people have been robbed. To what extent people have been robbed by these schemes can be gathered from the report of the Banking Commissioner of Kansas, which states that this law has saved the

people of that state $6,000,000.00 since its enactment and that between fourteen hundred and fifteen hundred companies have been investigated and less than four hundred licensed to do business under the Act.

The "Due Process" and "Equal Protection" clauses of the 14th Amendment were appealed to as a matter of course, and the "Interstate Commerce Clause" in addition. The Court disposed of the latter contention in a few words, to the effect that until Congress acts the State is free to impose such an incidental or indirect burden on interstate commerce as may result from the provisions of these "Blue Sky" laws which forbid (with certain exceptions and exemptions) the sale or disposition of corporate or quasi corporate securities within the State without state sanction.

In deciding that "Due Process" and "Equal Protection," etc., etc., did not interfere in these cases we catch a slight note of weariness in Mr. Justice McKenna's opinion in the Ohio cases. The learned Justice says:

> "It will be observed that these cases bring here for judgment an asserted conflict between national power and state power, and bring, besides, power of the state as limited or forbidden by the national Constitution.
>
> The assertion of such conflict and limitation is an ever-recurring one; and yet it is approached as if it were a new thing under the sun. The primary postulate of the state is that the law under review is an exercise of the police power of the state, and that power, we have said, is the least limitable of the exercises of government. Sligh *v.* Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501. We get no accurate idea of its limitations by opposing to it the declarations of the 14th Amendment that no person shall be deprived of his life, liberty, or property without due process of law, or denied the equal protection of the laws. Noble State Bank *v.* Haskell, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. A stricter inquiry is necessary, and we must consider what it is of life, liberty, and property that the Constitution protects.
>
> What life is and what may or may not affect it, we have quite accurate tests; and what liberty is in its outside sense, and, in like sense, what property is. We know that it is of the essence of liberty—indeed, we may say, of life—that there

shall be freedom of conduct, and yet there may be limitations upon such freedom. We know that, in the concept of property, there are the rights of its acquisition, disposition, and enjoyment,—in a word, dominion over it. Yet all of these rights may be regulated. Such are the declarations of the cases, become platitudes by frequent repetition and many instances of application."

The language of Justice McKenna that the police power of the State "is the least limitable of the exercises of government," is to be noted, and at another place in the opinion he refers to the argument of counsel as to the inconvenience the law might cause by its supervision and surveillance: "This," he says, "must yield to the public welfare, and against counsel's alarm of consequences we set the judgment of the State."

We conclude, therefore, that the only check upon the police power of the State resolves itself as to its "reasonableness" and that can only be measured by the Court, in each particular case.

The Federal Estate Tax.

Referring to our editorial in the January number of the REGISTER, to be found on page 702 of Vol. 2, N. S., the following amendment passed in March by the Congress and approved by the President, should be read in connection therewith, as it makes a decided increase in the tax rate, and personal representatives should take notice of this amendment:

That section two hundred and one, Title II, of the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:

"SEC. 201. That a tax (hereinafter referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

"One and one-half per centum of the amount of such net estate not in excess of $50,000;

"Three per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

"Four and one-half per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

"Six per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

"Seven and one-half per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

"Nine per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

"Ten and one-half per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

"Twelve per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

"Thirteen and one-half per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

"Fifteen per centum of the amount by which such net estate exceeds $5,000,000."

SEC. 301. That the tax on the transfer of the net estate of decedents dying between September eighth, nineteen hundred and sixteen, and the passage of this Act shall be computed at the rates originally prescribed in the Act approved September eighth, nineteen hundred and sixteen.

Proceedings to Ascertain Boundaries, Under the Act of 1912, Session Acts, page 133.

For the first time since the passage this act has come before our Court of Appeals and the decision is interesting as passing upon two questions. The court decides in the case of Colthurst *v.* Hiden, opinion of Judge Simms handed down March 15th, 1917, that the language "all persons interested in the co-terminus real estate" used in the act includes the owners of the land on both sides of the boundary line in controversy, and that where land is held by a like tenant not only that party but the parties entitled in fee to the remainder are necessarily parties either plaintiff or defendant. The statute provides that a trial by jury "may be waived by consent of parties." In this case there was no consent of parties entered of record and therefore the court reversed the case because it was tried by the court without

the intervention of a jury. The court decided also that the case must be heard upon the law side of the court. In this case the plaintiff was the owner of a life estate only in the real estate, his wife and children being entitled thereto in remainder in fee, and the court decides, as heretofore set out, that the wife and children should have been made parties either plaintiff or defendant.

Contributory Negligence—Imputable Negligence—Automobiles—Husband and Wife—Gratuitous Bailee.

In the case of *Virginia Railway & Power Company* v. *Gorsuch,* the opinion handed down by Judge Prentiss on March 15th, is interesting and instructive as to points therein settled. Mrs. Gorsuch, living in Baltimore, owned an automobile which she sent to her husband to use in Richmond. She came from Baltimore to Richmond on a visit, was met at the train by her husband with her automobile and while riding with a guest, her husband acting as chauffeur, one of the cars of the Virginia Railway & Power Company ran into the automobile and Mrs. Gorsuch was seriously hurt. The defense to her suit for damages set up was that there was contributory negligence on the part of the husband and that therefore this negligence was imputed to Mrs. Gorsuch in bar of her recovery against the Virginia Railway & Power Company. The question of imputable negligence seems to be one of first intention in Virginia and the opinion upon this point is as follows:

> "The doctrine of imputable negligence has been much discussed, and the books are full of cases dealing with the question. There are some conflicts in the decisions, but it may be regarded as settled by the overwhelming weight of authority, that the negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver. The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions. It seems to be well settled that the negligence of a husband driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him

by invitation. *Anthony* v. *Kiefner,* 96 Kan. 194, 150 Pac. 524; Ann Cas. 1916-E, 268; Ann Cas. 1912-A, 649; *Reading Township* v. *Telfer,* 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355; 110 Am. St. Rep. 289; *Schultz* v. *Old Colony R. Co.,* 193 Mass. 309, 8 L. R. A. (N. S.) 597; Wachsmith v. *B. & O. R. Co.,* 233 Pac. St. 465, 82 Atl 755; *St Louis & S. F. R. Co.* v. *Bell,* 159 Pac. 336."

It was claimed, however, that because Mrs. Gorsuch owned the automobile none of the above rules were applicable, but the court did not agree with this contention, holding that Mr. Gorsuch was the gratuitous bailee of the automobile and had been such for a week before the accident. His control of it while his wife remained in Baltimore was as absolute as if he had owned the machine and the casual visit of Mrs. Gorsuch to Richmond did not change his control.

We are inclined to think that it is a very good thing that female suffrage is not permitted in Virginia and that our Court of Appeals is not elected by popular vote. For we are afraid the language used by Judge Prentiss in this case and which we most heartily approve, would not meet with the approval of the suffragettes in this country. The court in passing upon the question as to whether Mrs. Gorsuch was responsible for the negligence of her husband, goes on to say:

"She was on the front seat, on the side of the automobile from which the street car was approaching, half turned so that she could not see the approaching street car, talking from time to time to their guest, Stephenson. This conduct was perfectly natural and such as is demanded by the ordinary rules of courtesy. She had no reason to distrust her husband's skill or carefulness, and notwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband as is suggested in Reading Township *v.* Telfer, Ann. Cas. Vol. 22, 1912-A, 649."

Whilst this is put in the head note of the case as the decision of the Court it is really *obiter* in our judgment, but nevertheless we trust it will be continued by the Reporter as the settled law in this State. In which wish we are satisfied all married men in the State will concur.